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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. CHARLES CARR, Defendant and Appellant.	A094332 (Alameda County Super. Ct. No. 136649A)

Charles Carr appeals his conviction, following a jury trial, of one count of first degree murder. (Pen. Code, § 187.) [1] The jury also found true an enhancement allegation pursuant to section 12022, subd. (a)(1). The court sentenced him to 25 years to life in prison, and imposed a one-year consecutive term on the enhancement. Carr filed a timely notice of appeal.

Appellant contends the court erred by denying his motion to suppress statements he made to the police after he was arrested, around midnight, on a misdemeanor warrant that was not endorsed for nighttime service. We shall find no error, and affirm the judgment.

FACTS

On June 27, 1997, two passersby assisted Tommie Cain after his car jumped the median in the area of Seminary Avenue in Oakland. Cain fell out of the car holding his side, and said he had been shot at a nearby gas station. Cain also told a police officer

[1] All subsequent statutory references are to the Penal Code unless otherwise indicated.

who arrived on the scene that he had been shot by two black men. Cain died of his wounds.

Three weeks later, an Oakland police officer stopped a vehicle with expired registration tags. Appellant, who was the driver, was arrested for possession of rock cocaine, and Jovan Reynolds was arrested for possession of a .38 caliber revolver. The gun was test fired at the police crime lab, and the bullets and casings were saved. In September 1998, a firearms identification expert matched them to a bullet taken from Cain's body.

Upon learning of the match, Sergeant Longmire put out a bulletin to have appellant arrested on an outstanding misdemeanor warrant. Appellant was arrested and was interviewed at the police station on October 23, 1998, at approximately 3:00 a.m. After waiving his Miranda rights, appellant stated that he, Jovan Reynolds, and Carlos Vincent were driving around East Oakland looking for people to rob the night Cain was killed. Appellant held the first victim at gunpoint, while Vincent took his money and property. Later, they saw Cain talking on the telephone at a gas station. Vincent and Reynolds got out of the car to rob Cain, and appellant stayed in the car. Appellant heard a gun shot. When Vincent and Reynolds ran back to the car, appellant drove it away.[2] At 9:30 the next morning appellant repeated to a representative of the district attorney's office that he knew Reynolds and Vincent were going to rob Cain, but denied that he intended to play any part in the crime. Appellant did admit that he drove the car away from the scene. The prosecution also submitted a letter found by Jovan Reynolds's father in Reynolds's bedroom, which a handwriting expert testified bore appellant's signature. The author of the letter claimed that the gun found in the July 1997 vehicle stop of appellant and Reynolds belonged to appellant.[3]

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[2] When Reynolds was interviewed he said that he was the one who drove them away from the scene.

[3] According to Sergeant Longmire's notes, appellant told him that Reynolds tried to get appellant to take the blame for everything found in the car.

ANALYSIS

I.

Denial of Motion to Suppress

Appellant filed two section 995 motions and a motion in limine seeking to suppress his statements, which were made at the police station after his arrest, on the ground that he was arrested, at approximately midnight, pursuant to a misdemeanor bench warrant that was not endorsed for nighttime service. The magistrate at the preliminary hearing denied the motion to suppress, finding that the statutory violation of section 840[4] did not violate appellant's Fourth Amendment rights, and the remedy of exclusion therefore did not apply.

At the preliminary hearing, Officer Midyett testified that, at night, on October 22, 1998, he entered a residence in the 2200 block of 83rd Avenue, in pursuit of a person who had fled into the apartment. Officer Midyett "believed [the person] was a male by the name of Brian Robinson also known as Beehive who had a parole violation warrant." Officer Midyett did not find Robinson, but he recognized appellant, who he knew from other contacts, sitting on a couch. Sergeant Longmire had informed Midyett that appellant had an outstanding misdemeanor warrant, and he should arrest appellant when he saw him. Midyett did not recall what time it was when he made the arrest, but appellant was brought to the homicide section of the police department, and Sergeant Longmire was alerted at 12:30 a.m. Appellant's taped interview with Sergeant Longmire began at 4:56 a.m.

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[4] Section 840 provides: "An arrest for the commission of a felony may be made on any day and at any time of the day or night. An arrest for the commission of a misdemeanor or an infraction cannot be made between the hours of 10 o'clock p.m. of any day and 6 o'clock a.m. of the succeeding day, unless:
"(1) The arrest is made without a warrant pursuant to Section 836 or 837.
"(2) The arrest is made in a public place.
"(3) The arrest is made when the person is in custody pursuant to another lawful arrest.
"(4) The arrest is made pursuant to a warrant which, for good cause shown, directs that it may be served at any time of the day or night."

Appellant's counsel initially contended that his arrest was illegal under *Payton v. New York* (1980) 445 U.S. 573 [absent exigent circumstances, entry into a private residence to make a warrantless arrest violates the Fourth Amendment]; *People v. Ramey* (1976) 16 Cal.3d 263 [same rule applies under the California constitution]; and *Steagald v. United States* (1981) 451 U.S. 204 [police must have search warrant to enter third party residence to make an arrest]. Yet, when Midyett testified that he entered the residence in pursuit of a person he believed to be Brian Robinson, a parolee with an outstanding warrant, appellant's counsel stated he had no reason to disbelieve Midyett and conceded that there was "no issue" regarding the lawfulness of the initial entry.[5] (See *People v. . Lloyd* (1989) 216 Cal.App.3d 1425, 1429.) Appellant therefore waived any contention on appeal that the initial entry violated the Fourth Amendment.

[5] Appellant has filed a petition for habeas corpus contending that this concession constituted ineffective assistance of counsel. He argues that Midyett's testimony did not support a finding of hot pursuit or exigent circumstances, and an adequate investigation would have disclosed that Midyett testified at Brian Robinson's preliminary hearing that the last time he had contact with Robinson, prior to Robinson's arrest on October 24, 1998, was when Robinson fled from Midyett several months earlier. Appellant contends Midyett's testimony at Robinson's hearing contradicts his testimony in appellant's case. We find no inherent inconsistency, because Midyett testified that he was chasing a person he believed to be Robinson.

Nor, was it ineffective assistance to concede that the initial entry did not violate the Fourth Amendment. Midyett, who knew that there was an outstanding warrant for Robinson, first contacted him on a public street and pursued him when he retreated into a residence in an apparent attempt to escape and avoid arrest. When an arrest, or in this case an attempted arrest, is set in motion in a public place, the police may pursue a retreating suspect into a private residence, even if the offense is a mere misdemeanor. (*United States v. Santana* (1976) 427 U.S. 38, 42-43; *People v. Lloyd, supra,* 216 Cal.App.3d 1425, 1429.) The primary case upon which appellant relies, *Welsh v. Wisconsin* (1984) 466 U.S. 740, 749-750, is distinguishable because in that case the police did not initially contact the defendant in a public place. Instead, after identifying the defendant as the driver of a vehicle, who a witness described as possibly intoxicated, the police went to the driver's house, entered and found him lying in bed.

We conclude that appellant has failed to make a prima facie case of ineffective assistance of counsel. We deny his petition for habeas corpus by separate order.

It was also undisputed that there was a misdemeanor warrant for appellant's arrest, which was not endorsed for nighttime service, and that, in violation of section 840, appellant was arrested after 10:00 p.m. and before 6:00 a.m. Appellant did not contend that the warrant was not supported by probable cause. Thus, the issue was reduced to whether the violation of the statutory restriction against nighttime service of a misdemeanor arrest warrant required suppression of appellant's subsequent statements to the police. We hold that the court correctly concluded it did not.

First, the restriction on nighttime service of a misdemeanor warrant is a statutory restriction on the manner of service of a warrant imposed by state law. Since the passage of California Constitution, article I, section 28, subdivision (d) (hereafter Proposition 8), relevant evidence cannot be excluded unless the exclusion is required under federal law. (*People v*. *McKay* (2002) 27 Cal.4th 601, 608; *People v. Hines* (1997) 15 Cal.4th 997, 1043-1044.)

The United States Supreme Court has held that statutory knock-notice restrictions on the service of warrants derive from common law principles incorporated by the Fourth Amendment. Therefore, although violation of a knock-notice statute does not, per se, render a search or seizure unreasonable under the Fourth Amendment, the statutory violation may be a factor in assessing its reasonableness. (*Wilson v. Arkansas* (1995) 514 U.S. 927, 930.) Most state statutory restrictions on the procedure for arrests or, the manner of service of warrants, however, do not implement common law principles incorporated in the Fourth Amendment. (See, e.g., *People* v. *McKay*, *supra*, 27 Cal.4th 601, 607-619 [alleged violation of Veh. Code, § 40302, subd. (a) establishing state procedure for making a custodial arrest does not render arrest unreasonable under federal law, and therefore the exclusionary remedy is unavailable].) The United States Supreme Court has yet to decide whether violation of a restriction on nighttime service of a search or arrest warrant is, like a violation of knock-notice rules, a part of the reasonableness inquiry under the Fourth Amendment.[6] Several lower federal courts, however, have held

[6] In *Gooding v. United States* (1974) 416 U.S. 430, the court held only that, *as a matter of statutory interpretation*, a federal statute applied to a search conducted in the District of

that a violation of rule 41(c) of the Federal Rules of Criminal Procedure (18 U.S.C.), which prohibits nighttime execution of search warrants, does not automatically require suppression of evidence seized in the search if the circumstances render the search otherwise reasonable. (See, e.g., *United States v. Searp* (6th Cir. 1978) 586 F. 2d 1117, 1122-1125 [suppression not required where no bad faith conduct by police and no prejudice to defendant in the sense that search would not have been so abrasive if rule had been followed]; *United States v. $22,287.00 United States Cur.* (6th Cir. 1983) 709 F.2d 442, 449; *United States v. Bassford* (D.Me. 1985) 601 F.Supp. 1324, 1332, affd. (1st Cir. 1987) 812 F.2d 16.)

The California courts have adopted a similar analysis. For example in *Rodriguez v. Superior Court* (1988) 199 Cal.App.3d 1453, the court held that a violation of section 1533, which requires a separate showing of good cause for nighttime execution of a search warrant, did not automatically require suppression of evidence seized in that search. The court noted two of its own decisions, *Tuttle v. Superior Court* (1981) 120 Cal.App.3d 320, and *People v. Watson* (1977) 75 Cal.App.3d 592, had held that violation of section 1533 required suppression of evidence seized in a nighttime search. These decisions, the *Rodriguez* court acknowledged, failed to consider, as required after Proposition 8, whether suppression would be required under federal law. The court drew an analogy between the violation of section 1533, and the violation of rule 41(c) of the Federal Rules of Criminal Procedure (18 U.S.C.). In reliance upon *United States v. Searp, supra,* 586 F.2d 1117, the *Rodriguez* court stated that the federal courts have reasoned that the statutory violation does not also violate the Fourth Amendment, if the circumstances otherwise render the search or seizure reasonable. "If exclusion of evidence seized in searches violative of nighttime service requirements is not compelled under current federal law, evidence seized in violation of section 1533 should not be excluded if the search is otherwise reasonable in a constitutional sense." (*Rodriguez v.*

Columbia, and it did not require an additional showing of cause for conducting a nighttime search for narcotics.

Superior Court, supra, 199 Cal.App. 3d 1453, 1470.) Applying this standard, the court concluded that the search was not unreasonable, because it was conducted at 10:30 p.m., pursuant to a warrant supported by probable cause, and the evidence should not be suppressed. *(Ibid.;* see also *People v. Donaldson* (1995) 36 Cal.App.4th 532 [after the passage of Prop. 8, a violation of Pen. Code, § 836, subd. (a)(1), which requires that the offense for a misdemeanor warrantless arrest be committed in the presence of the peace officer, did not require suppression of evidence].)

Thus, even if we assume arguendo that, as with a violation of a knock-notice statute, a violation of section 840 may be a factor in assessing whether the arrest was unreasonable under the Fourth Amendment, in no event does the statutory violation, *by itself*, establish that the arrest was unreasonable. In *People v. Hoag* (2000) 83 Cal.App.4th 1198, for example, the court held a violation of the knock-notice rule does not violate the Fourth Amendment unless the search "was unreasonable in light of the totality of the circumstances." (*Id.* at p. 1208.) In assessing the reasonableness of the search the court further reasoned that the "concept of substantial compliance . . . is consistent with general principles of Fourth Amendment analysis." (*Id*. at p. 1209.) Thus, although the knock-notice rule had been technically violated by the failure of the officers to wait long enough after announcing their presence to infer that admittance had been refused, "the essential Fourth Amendment inquiry is whether, under the totality of the circumstances, the policies underlying the knock-notice requirement have nevertheless been served." (*Id.* at p. 1211.) The underlying purposes of the knock-notice rule include the protection of privacy of homeowners and of innocent persons who may also be present, and prevention of violent confrontations with startled occupants with the attendant risk of injury to people and property. The primary purpose of the knock-notice rule was satisfied because the police announced their presence, did not break down the door, which was unlocked, or rush the occupants, and met with no resistance. The court concluded the search was reasonable under the totality of circumstances, and that suppression of evidence was not required. (*Id.* at pp. 1211-1212.)

Similarly, here, although section 840 may have been technically violated by arresting appellant between the hours of 10:00 p.m. and 6:00 a.m., instead of waiting until the morning, or until appellant exited the house, there was substantial compliance with the statutory restriction against nighttime service of an arrest warrant. Under the totality of circumstances the arrest was not unreasonable within the meaning of the Fourth Amendment. In *People v. Whitted* (1976) 60 Cal.App.3d 569, the court explained the "basic principle of the limitation upon service of arrest warrants is the protection of an 'an individual's right to the security and privacy of his home, particularly during night hours' and the avoidance of the danger of violent confrontations inherent in unannounced intrusion at night [citation omitted]." (*Id.* at p. 572.) Here, however, Officer Midyett did not enter the premises at night to serve the arrest warrant on appellant. Instead, entry was made in pursuit of another person, and the discovery of appellant was serendipitous. Thus, any Fourth Amendment concerns about the initial entry were satisfied, and once inside, there was no greater risk of violent confrontation in making the arrest pursuant to the misdemeanor warrant than there would have been had Officer Midyett encountered appellant on a public street, where he could have been arrested *at any time* without violating section 840. (§ 840, subd. (2).) Moreover, Midyett did not, in fact, encounter any resistance. Nor do the circumstances of the arrest suggest that Midyett deliberately abused, or took advantage of the circumstance that it was late at night, because Midyett found appellant awake, sitting on a living room couch. Although appellant was not arrested upon a public street, Officer Midyett did have the right to be where he was when he encountered appellant and, consistent with the underlying purposes of section 840, did not enter the premises at night for the purpose of executing the misdemeanor warrant. We conclude, under the totality of the circumstances, the arrest was not unreasonable within the meaning of the Fourth Amendment, and therefore the remedy of exclusion is unavailable.

CONCLUSION

The judgment is affirmed.

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Stein, J.

We concur:

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Marchiano, P.J.

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Swager, J.